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No. 93-783

In The

# Supreme Court of the United States

October Term, 1993

EDWIN T. SHIMODA, Administrator, Oahu Community Correctional Center,

*Petitioner,*

vs.

RONALD S. BURGO, MELVIN KAUHANE, Sergeant, Oahu Community Correctional Center, and HAROLD FALK, Director, Department of Corrections,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENT RONALD S. BURGO'S BRIEF IN OPPOSITION

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## RESPONDENT RONALD S. BURGO'S BRIEF IN OPPOSITION

Respondent Ronald S. Burgo respectfully requests that this Court deny the petition for Writ of certiorari, seeking review of the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in C.A. No. 92-16352 (9th Cir.) on March 17, 1993, as amended by the opinion and judgment entered herein on august 18, 1993.

## BRIEF STATEMENT OF THE CASE

On April 20, 1987, Samuel Kalilikane, an inmate at the Oahu Community Correctional Center, filed a grievance stating that he was viciously assaulted on February 27, 1987, by Melvin Kauhane, a Sergeant and Adult Correctional Officer ("ACO Kauhane"). *See* Pet at A67-69. As a result of the investigation, ACO Kauhane was subjected to a "no inmate contact" pursuant to an order entered on June 18, 1987. *See* Pet. at A36-37. According to this notice, "ACO Melvin Kauhane will be assigned to the Second Watch Security, with Saturday/Sundays off until further notice. He is to have NO INMATE CONTACT until further notice." *See* Pet. at A66.

Despite the no inmate contact order, on September 9, 1987. ACO Stephen Adams filed an incident report involving ACO Kauhane and another inmate. In the report, ACO Adams described that he witnessed ACO Kauhane escorting an inmate to the strip search room. ACO Adams then heard what appeared to be a scuffle and upon entering the room to investigate, observed both men "holding each other by the arms and talking aloud." *See* Pet. at A70-71.

It is undisputed that Petitioner, who was then the administrator of the Oahu Community Correctional Center, had knowledge of the no inmate contact order and the subsequent investigation of ACO Kauhane's "scuffle" with an inmate. *See* Pet. at A36-37.

On March 26, 1988, ACO Kauhane severely beat inmate Ronald S. Burgo, respondent herein, resulting in serious and permanent injuries. *See* Pet. at 2-3.

## REASONS WHY THE WRIT SHOULD BE DENIED

**The Ninth Circuit Court Fully Considered And Correctly Decided The Issues Presented.**

Petitioner confuses the requirement to establish a violation of Burgo's constitutional rights with the standard of care required by a prison official to avoid personal liability. The Ninth Circuit was correct in first identifying the right that was allegedly violated and whether that right was clearly established at the time of the alleged violation. *See* Pet. at A9.

The appellate court correctly determined that at the time of the assault on Burgo in March, 1988, it was clearly established that the use of excessive force against a prisoner by prison personnel violated the prisoner's eighth amendment rights. *See* Pet. at A10-11 (citing *McRorie v. Shimoda,* 795 F.2d 780 (9th Cir. 1986)). Even under the heighten standard propounded by the petitioner by this Court's recent decision in *Helling v. McKinney,* 113 S. Ct. 2475 (U.S. June 18, 1993), petitioner's inaction despite knowledge of ACO Kauhane's continued contact with prisoners, clearly exposed each inmate who came in contact with ACO Kauhane to serious risk. Petitioner's failure to act can easily be considered to "be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *See* Pet. at 16 (citing *Helling v. McKinney* at 2482). Relying on *Helling,* petitioner attempts to convince this Court that environmental risks, *i.e.* tobacco smoke, is akin to being brutally assaulted by a corrections officer. Nor can petitioner rely on his statements that ACO Kauhane's actions, which resulted in emergency surgery to wire Burgo's jaw,

"would not have been held unconstitutional at all unless it was imposed 'maliciously and sadistically to cause harm.' " *See* Pet. at 16 (quoting *Hudson v. McMillian*, 112 S. Ct. 995, 999 (1992)). Petitioner cannot expect this Court to believe that the injuries resulting from ACO Kauhane's actions were done unintentionally.

In this case, the record clearly reveals a violation of Burgo's constitutional right from the use of excessive force by ACO Kauhane. Accordingly, the Ninth Circuit was correct in affirming the district court's determination that Burgo's right not to be subjected to excessive force by prison personnel was clearly established.

The Ninth Circuit was also correct in applying the "deliberate indifference" standard instead of the standard petitioner urged which was the Burgo must prove that the petitioner had acted "maliciously or sadistically" to Burgo's right. At the time the incident occurred, it was well established in the Ninth Circuit that prisoners could state a claim against prison personnel under 42 U.S.C. § 1983 by establishing that prison personnel acted with deliberate indifference in creating the condition that violated their constitutional rights. *Leer v. Murphy*, 844 f.2d 628, 633 (9th Cir. 1988) (citing *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) and *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986)). It was the responsibility of the supervisory prison personnel not to act with deliberate indifference to Burgo's right not to be subjected to excessive force.

Contrary to petitioner's argument that "the Ninth Circuit cut off Petitioner's qualified immunity argument at the knees" by freezing preexisting law at the court of

appeals level at the time Petitioner acted; petitioner cannot dispute that this Court held in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), that immunity does not exist if the unlawfulness is apparent in light of preexisting laws. *See* Pet. at 22. The standard that must be applied is the law that is in existence at the time the violation occurred. Clearly, any person cannot be expected to foresee the changes in the law years in advance and adjust their actions accordingly. The law is a dynamic entity and constantly evolving with time. Without application of the preexisting law at the time of the violation, neither the petitioner nor the respondent would know what rights each are afforded if those rights could be extinguished by a change during litigation.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: Honolulu, Hawaii, February 14, 1994.

MICHAEL F. MCCARTHY
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*Attorneys for Respondent*
*Ronald S. Burgo*